Supreme Court, U.S.
FILED
MAR 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1336

In the Supreme Court of the United States

OCTOBER TERM, 1987

GENE LEE BENNETT,

Petitioner,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of Florida, Third District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

W. Barry Blum
Counsel of Record
David B. McCrea
TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131

Counsel for Respondent,
The International Bank of Miami, N.A.

DESIGNATION OF CORPORATE RELATIONSHIPS

International Bancorp of Miami, Inc.
International Bancorp of Miami N.V.
Granvalour Holdings, S.A.

TABLE OF CONTENTS

	Page
DESIGNATION OF CORPORATE RELATIONSHIPS	(i)
TABLE OF AUTHORITIES	(iii)
SUMMARY OF ARGUMENT	1
ARGUMENT	1
I. THE PETITION FOR CERTIORARI SHOULD BE DISMISSED BECAUSE PETITIONER DIED ELEVEN MONTHS BEFORE THE PETITION WAS FILED	1
II. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO GRANT CERTIORARI BECAUSE THE FLORIDA COURT JUDGMENT IS CONSISTENT WITH ALL OTHER RELEVANT AUTHORITY AND UPHOLDS THE ASSERTED FEDERAL TITLE, RIGHT, PRIVILEGE OR IMMUNITY	3
A. The Judgment Below is Consistent with Every Other Case Addressing §24, Fifth of the National Bank Act	3
B. Review by Certiorari is Rarely Granted When a Specially Set Up Federal Claim is Upheld	5
CONCLUSION	6
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

Cases

Alfano v. First National Bank, 111 A.D.2d 960, 490 N.Y.S.2d 56 (App. Div. 1985) 4

Armano v. Federal Reserve Bank, 468 F. Supp. 674 (D. Mass. 1979) 4

Bollow v. Federal Reserve Bank, 650 F.2d 1093 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) 4

Citizens State Bank v. Libertelli, 215 N.J. Super. 190, 521 A.2d 867 (App. 1986) ... 4

Copeland v. Melrose National Bank, 229 A.D. 311, 241 N.Y.S. 429 (App. Div. 1930) 3, 4, 5

Dove v. United States, 423 U.S. 325 (1976) 2

First National Bank v. Reynolds, 491 N.E. 2d 218 (Ind. Ct. App. 1986) 4-5

Hawkins v. Peoples Federal Savings & Loan Association, 155 Mich. App. 237, 399 N.W.2d 484 (1986) 4

Kaipu v. Pinkham, 206 U.S. 566 (1907) 2

Kemper v. First National Bank, 94 Ill. App. 3d 169, 418 N.E.2d 819 (1981) 4

Logan County National Bank v. Townsend, 139 U.S. 67 (1891) 6

Michigan National Bank v. Robertson, 372 U.S. 591 (1963) 6

Mitchell v. American Savings & Loan Association, 122 Ariz. 138, 593 P.2d 692 (1979) 5

National Bank of North America v. Associates of Obstetrics & Female Surgery, Inc., 425 U.S. 460 (1976) 5-6

Pennwell v. Newland, 180 F.2d 551 (9th Cir. 1950) 2

TABLE OF AUTHORITIES (Continued)

	Page
Rohde v. First Deposit National Bank, 127 N.H. 107, 497 A.2d 1214 (1985)	3, 4, 5
Roy v. Woonsocket Institution for Savings, 525 A.2d 915 (R.I. 1987)	4
Third National Bank in Nashville v. Impac Ltd., 432 U.S. 312 (1977)	5
Van Slyke v. Andrews, 146 Minn. 316, 178 N.W. 959 (1920)	4
Warden v. Palermo, 431 U.S. 911 (1977)	2
Yates v. Jones National Bank, 206 U.S. 158 (1907)	6

Statutes and Rules

12 U.S.C. §24, Fifth (1940)	1, 3, 4
12 U.S.C. §341, Fifth (1940)	4
28 U.S.C. §1257(3) (1948)	5
12 C.F.R. §544.5 (1984)	4
Sup. Ct. R. 17.1(b)	3
Sup. Ct. R. 19.1	2
Sup. Ct. R. 19.4	2
Sup. Ct. R. 40	2
Sup. Ct. R. 40.1	2
Sup. Ct. R. 50	3

SUMMARY OF ARGUMENT

The petition for certiorari should be dismissed because the named petitioner, Gene Lee Bennett, died eleven months before the petition was filed. The executor of Bennett's will was substituted for Bennett as a party in the Florida state trial court proceeding in October, 1987. Bennett, a deceased person, can not properly invoke this Court's jurisdiction.

Further, the petition demonstrates no grounds for discretionary review. The Florida court of appeal's decision is in accord with every other court addressing the validity of a severance pay provision or other contractual provision restricting a national bank's authority to discharge its officers at pleasure pursuant to 12 U.S.C. §24, Fifth. The Florida court of appeal, moreover, upheld the right, privilege or immunity under the National Bank Act asserted by The International Bank of Miami, N.A. This Court very rarely has granted certiorari when a right under the national banking laws has been upheld, rather than denied, by a state court.

The petition for certiorari does not demonstrate that the instant case merits discretionary review by this Court.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE DISMISSED BECAUSE PETITIONER DIED ELEVEN MONTHS BEFORE THE PETITION WAS FILED

The instant petition was purportedly filed on behalf of Gene Lee Bennett ("Bennett"). The petition fails to inform the Court, however, that Bennett died on March 8, 1987. Indeed, a motion for substitution was filed by Bennett's counsel in the Florida state trial court proceed-

ing and an order substituting the executor of Bennett's will in that proceeding was entered on October 27, 1987. (App. 2-6) Thus, the filing of the instant petition in Bennett's name is improper.

The certiorari jurisdiction of this Court has not properly been invoked. This Court's rules contemplate the filing of a writ of certiorari only by a "party." Sup. Ct. R. 19.1, .4. A deceased person cannot reasonably be considered a "party" who can properly invoke this Court's jurisdiction. *See Pennwell v. Newland,* 180 F.2d 551 (9th Cir. 1950) (deceased man has no privilege of appeal; appeal by non-existent person is neither unsubstantial "procedural irregularity" nor "harmless error").

This Court has dismissed petitions for certiorari when it was learned that petitioner had died. *Warden v. Palermo,* 431 U.S. 911 (1977); *Dove v. United States,* 423 U.S. 325 (1976); *see Kaipu v. Pinkham,* 206 U.S. 566 (1907) (appeal dismissed). The instant petition similarly should be dismissed. In *Palermo* and *Dove,* the petitioners were at least alive when the petitions were filed invoking this Court's jurisdiction.

Moreover, Rule 40 of this Court does not apply to permit substitution at this time. Rule 40 applies "[w]henever any party shall die *after* filing a notice of appeal to this Court or a petition for writ of certiorari . . . ." Sup. Ct. R. 40.1 (emphasis added). This Court's provisions for substitution of a party presuppose that the Court's jurisdiction was invoked by a proper and qualified appellant or petitioner, and not a deceased person.

Here, petitioner having died prior to the filing of the petition, an executor having been appointed and a motion for substitution having been made and granted in the trial

court, the deceased Bennett was not properly a "party" able to invoke this Court's certiorari jurisdiction.[1] The petition for certiorari to the Court of Appeal of Florida, Third District should be dismissed.

II. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO GRANT CERTIORARI BECAUSE THE FLORIDA COURT JUDGMENT IS CONSISTENT WITH ALL OTHER RELEVANT AUTHORITY AND UPHOLDS THE ASSERTED FEDERAL TITLE, RIGHT, PRIVILEGE OR IMMUNITY

A. The Judgment Below is Consistent with Every Other Case Addressing §24, Fifth of the National Bank Act

The instant petition does not merit review in light of the considerations governing certiorari set forth in the Rules of this Court. The petition certainly does not demonstrate that the Florida court of appeal's judgment is "in conflict with the decision of another state court of last resort or of a federal court of appeals." Sup. Ct. R. 17.1(b). Indeed, the only two cases specifically addressing the validity of a severance pay provision respecting a discharged national bank officer are in accord with the Florida court of appeal. *Rohde v. First Deposit Nat'l Bank,* 127 N.H. 107, 497 A.2d 1214 (1985); *Copeland v. Melrose Nat'l Bank,* 229 A.D. 311, 241 N.Y.S. 429 (App. Div. 1930).

Similarly, courts are in agreement that any contractual provision that restricts a national bank board of directors'

---

[1] The fact that the executor is not the petitioner raises questions as to the authority of Bennett's counsel to proceed with this petition and whether there is a proper "petitioner" involved against whom, for example, the Court may tax costs under Sup. Ct. R. 50.

right to discharge an officer with no liability under the contract is void under the National Bank Act, 12 U.S.C. §24, Fifth. *Kemper v. First Nat'l Bank,* 94 Ill. App. 3d 169, 418 N.E.2d 819 (1981); *Van Slyke v. Andrews,* 146 Minn. 316, 178 N.W. 959 (1920); *Alfano v. First Nat'l Bank,* 111 A.D.2d 960, 490 N.Y.S.2d 56 (App. Div. 1985).

Cases construing analogous federal or state statutes also are consistent with the Florida court of appeal's decision. *Bollow v. Federal Reserve Bank,* 650 F.2d 1093 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982) (construing 12 U.S.C. §341, Fifth regarding discharge of Federal Reserve Bank officer); *Armano v. Federal Reserve Bank,* 468 F. Supp. 674 (D. Mass. 1979) (same); *Citizens State Bank v. Libertelli,* 215 N.J. Super. 190, 521 A.2d 867 (1986) (construing New Jersey state banking law by reference to 12 U.S.C. §24, Fifth); *Hawkins v. Peoples Fed. Sav. & Loan Ass'n,* 155 Mich. App. 237, 399 N.W.2d 484 (1986) (interpreting Federal Home Loan Bank Board-mandated bylaw, 12 C.F.R. §544.5, by reference to 12 U.S.C. §24, Fifth); *Roy v. Woonsocket Inst. for Sav.,* 525 A.2d 915 (R.I. 1987) (construing Rhode Island statute by reference to 12 U.S.C. §24, Fifth).

First National Bank v. Reynolds, 491 N.E.2d 218 (Ind. Ct. App. 1986), cited by petitioner, is not in conflict with the Florida court of appeal's judgment. In *Reynolds,* the court went to great lengths to distinguish the case from the situation in the *Copeland* and *Rohde* cases relied upon by the Florida court of appeal. The *Reynolds* court rested its decision solely on the fact that the officer in that case *resigned* for a specifically contemplated reason and was

not discharged, as was Bennett in this case. As the *Reynolds* court explained:

> The terms "dismiss" and "resign" are not synonymous, indeed they are antithetical .... Clearly, the terms are mutually exclusive.

491 N.E.2d at 222.

Without addressing the soundness of the *Reynolds* decision, it clearly is not in conflict with the Florida court of appeal's judgment.[2] As petitioner acknowledges, Bennett was discharged. The *Copeland — Rohde* line of cases control and are in accord.

B. Review by Certiorari is Rarely Granted When a Specially Set Up Federal Claim is Upheld

In the instant case, The International Bank of Miami, N.A. raised a defense founded upon the National Bank Act to Bennett's contractual claim to the interpleaded fund. The Florida court of appeal upheld the bank's federal law-based claim.

Historically, in cases where certiorari is sought under 28 U.S.C. §1257(3) (1948) based upon a claim of title, right, privilege or immunity under the national banking laws, this Court more readily has exercised its discretionary jurisdiction when the specially set up federal claim was denied by a state court. *See, e.g., Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312 (1977), *aff'g* 541 S.W.2d 139 (Tenn. 1976); *National Bank of N. Am. v. Associates of Obstetrics & Female Surgery, Inc.*, 425 U.S.

---

[2] *Mitchell v. American Sav. & Loan Ass'n*, 122 Ariz. 138, 593 P.2d 692 (1979), cited by petitioner, also has no pertinence to this matter given that the case was decided entirely under Arizona state law and did not even address the National Bank Act.

460 (1976), *vacating Associates of Obstetrics & Female Surgery, Inc. v. Apollo Prods., Inc.*, 542 P.2d 1079 (Utah 1975); *Michigan Nat'l Bank v. Robertson*, 372 U.S. 591 (1963), *vacating Hills v. Burnett*, 172 Neb. 370, 109 N.W.2d 739 (1961); *Yates v. Jones Nat'l Bank*, 206 U.S. 158 (1907), *rev'g* 74 Neb. 734, 105 N.W. 287 (1905); *Logan County Nat'l Bank v. Townsend*, 139 U.S. 67 (1891), *aff'g* 3 S.W. 122 (Ct. App. Ky. 1887).

The instant matter, where the federal claim was sustained and, indeed, where petitioner asserts that the federal issue should not control, is one that does not merit discretionary review. This is especially so where, as here, there is an established and consistent line of case law upholding the claimed federal title, right, privilege or immunity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Court of Appeal of Florida, Third District should be dismissed or denied.

W. Barry Blum
Counsel of Record
David B. McCrea

TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131
(305) 371-2600

Counsel for Respondent, The International Bank of Miami, N.A.

Appendix

APPENDIX

	Page
Motion for Substitution of Party	App. 2
Agreed Order Substituting Party	App. 5

In The Circuit Court of The 11th Judicial Circuit in and for Dade County, Florida

GENERAL JURISDICTION DIVISION

CASE NO.: 84-16667 (30)

FLORIDA BAR NO.: 265152

SOUTHEAST BANK, a national banking corporation,
Plaintiff,

vs.

THE INTERNATIONAL BANK OF MIAMI, N.A., a national banking association, GENE LEE BENNETT, ALBERTO GONZALEZ, GUILLERMO ROSSELL, and INTERNATIONAL BANK OF FLORIDA,
Defendants.

THE INTERNATIONAL BANK OF MIAMI, N.A., a national banking association,
Cross-Plaintiff,

vs.

GENE LEE BENNETT and CARLTON STEWART,
Cross-Defendants.

MOTION FOR SUBSTITUTION OF PARTY

Margaret E.S. Bennett, personal representative for the Estate of Gene Lee Bennett, respectfully moves this Honorable Court for an Order substituting her, as personal representative for the Estate of Gene Lee Bennett, as a party for Gene Lee Bennett in this action. As

grounds therefor, Mrs. Bennett would show unto the Court that:

1. Mr. Bennett has passed away. Mrs. Bennett has been appointed as personal representative for his Estate. Attached to this motion is a copy of the Court Order appointing her.

2. Mrs. Bennett therefore moves to be substituted, in her capacity as a personal representative for the Estate, as a party in place of Mr. Bennett.

Respectfully submitted,

BAILEY, DAWES & HUNT
a professional association
1390 Brickell Avenue
Penthouse
Miami, Florida 33131
Tel.: (305) 374-5505

By: /s/
Sara Soto

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 22nd day of September, 1987, to David McCrea, Esq., Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 777 Brickell Avenue, Fifth Floor, Miami, Florida 33131.

/s/
Of Counsel

[INFORMATION NOT MATERIAL TO ORDER EXCLUDED]

Attorney or Party Without Attorney: *(Name and Address)*
JOHN R. VAN SICKLE
Attorney at Law Ste 220C
11858 Bernardo Plaza Court
San Diego, California 92128
Telephone No.: (619) 487-4011

Attorney for *(Name)*: Petitioner, Margaret E. S. Bennett
Superior Court of California, County of San Diego
Street Address: 220 West Broadway
Mailing Address: P. O. Box 128
City and Zip Code: San Diego, California 92112

State of (Name): Gene Lee Bennett, Decedent

ORDER FOR PROBATE

Order Appointing: ☒ Executor
☒ Order Authorizing Independent Administration of Estate
☒ with full authority

Date of hearing: 4-30-87 Time: 9:00 a.m. Dept/Rm: 21 Judge: Paul E. Overton

THE COURT FINDS

a. All notices required by law have been given.
b. Decedent died on *(date)*: March 8, 1987
☒ a resident of the California county named above
c. Decedent died ☒ testate and decedent's will dated: December 21, 1984 was admitted to probate by Minute Order on *(date)*: 4-30-87

THE COURT ORDERS

(Name): Margaret E. S. Bennett
is appointed
☒ Executor of the decedent's will

and letters shall issue on qualification.
☒ Full: Authority is granted to administer the estate under The Independent Administration of Estates Act.
☒ Bond is not required.

PAUL EUGENE OVERTON
Judge of the Superior Court

Filed Probate Division
April 30, 1987
Case Number: 143104
Robert D. Zumwalt, Clerk

In The Circuit Court of The 11th Judicial Circuit in and for Dade County, Florida

GENERAL JURISDICTION DIVISION

CASE NO.: 84-16667 (30)

SOUTHEAST BANK, a national banking corporation,
Plaintiff,

v.

THE INTERNATIONAL BANK OF MIAMI, N.A., a national banking association, GENE LEE BENNETT, ALBERTO GONZALEZ, GUILLERMO ROSSELL, and INTERNATIONAL BANK OF FLORIDA,
Defendants.

THE INTERNATIONAL BANK OF MIAMI, N.A., a national banking association,
Cross-Plaintiff,

v.

GENE LEE BENNETT and CARLTON STEWART,
Cross-Defendants.

AGREED ORDER SUBSTITUTING PARTY

THIS CAUSE came before the Court on the parties' agreement to the granting of Margaret E.S. Bennett's Motion For Substitution of Party, and the Court having reviewed the file, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED, as follows:

1. Mrs. Bennett's motion is granted.

2. Margaret E.S. Bennett, in her capacity as personal representative for the Estate of Gene Lee Bennett, is hereby substituted as a party for Mr. Bennett.

DONE AND ORDERED in chambers at Dade County, Florida this 27th day of October, 1987.

/s/
Circuit Court Judge

Copies furnished to:

David McCrea, Esq.
Sara Soto, Esq.